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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 986

LOUIS FRIED,

Petitioner,

vs.

BROOKLYN BAR ASSOCIATION,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION BRIEF

The respondent (Brooklyn Bar Association), in its opposition brief herein, represents as being true, a material fact of the case which it knows, or certainly ought to know, is not true at all.

Respondent, being a Bar Association and an agent of the Court, is chargeable with the highest degree of honesty, integrity and ethics when presenting the facts and law of a case. It is likewise chargeable in all matters pertaining to the legal profession. Therefore, any misrepresentation or withholding of a material fact or law in a case, intentionally or otherwise, is particularly reprehensible.

Petitioner points out herein some material facts and law misrepresented by the respondent in its said opposition brief.

On page 2, second paragraph, respondent alleges:

> "*Charges were served upon the petitioner* by the Brooklyn Bar Association and upon his default and

failure to answer *said charges* an order was entered for his disbarment in January, 1936 . . .'' (Italics supplied by petitioner)

The true fact, however, is: Charges were *never* served upon petitioner, either *before* the disbarment order of January, 1936 was entered, or at any time thereafter to the present day. And the fact that charges were *not* served is a crucial factor of the appeal herein.

As to this, the truth of petitioner's contention is established as follows:

1) The certified transcript of the record herein (a schedule of which was duly furnished to respondent) fails to show the existence of any such charges.

2) Since they are not part of the certified transcript, if such charges are of record elsewhere, it was incumbent upon the respondent to submit a copy thereof for inclusion in the certified transcript. *It could not do so because they never existed.*

3) Had such charges in fact been served on petitioner as alleged, certainly a copy thereof would have been quoted in its opposition brief. *It did not do so because they never existed.*

4) As respondent well knows, petitioner's disbarment was effected *automatically* under the erroneous belief that he was convicted of a felony, and that as to a felony conviction the New York Judiciary Law requires neither charges nor a hearing thereon. Furthermore, it is of record that respondent's very own Counsel, who previously investigated and prosecuted this case, stated for the record as follows:

> ''As a result of such conviction, *he was automatically disbarred, since it was believed at that time that no hearing was necessary''.*

In view of the foregoing several items of evidence in the case, all available to the respondent, it becomes difficult to believe that its representation that "charges were served upon the petitioner", is not a deliberate attempt to mislead the honorable Supreme Court of the United States. Such attempt by a Bar Association would make it the more culpable and censurable.

And, if further proof is needed to show that such charges never were served upon petitioner, it should be evident from the respondent's very opposition brief itself, first paragraph at top of page 4 thereof, which states:

> "Since Mr. Fried did receive *or had knowledge of the charges made against him . . .*" (Italics furnished by petitioner)

Why *"or had knowledge of the charges"*. Certainly this is an admission or implication that respondent itself doubts that charges were in fact served upon petitioner. And certainly, it ought to know that merely *"having knowledge of charges"* is not at all a compliance with the statute, (Judiciary Law Sec. 90(6), formerly Sec. 88(2)), which clearly mandates that—

> "* * * a copy of the charges must be delivered to him personally * * * and he must be allowed an opportunity of being heard in his defense."

It cannot be emphasized too strongly that the disbarment order of January, 1936 (now Exhibit "B", pages 13 and 14, certified transcript herein) is based solely and exclusively upon a petition (now Exhibit "A", pages 10, 11 and 12, certified transcript herein) made by the respondent and addressed to the Appellate Division, and *not charges addressed* to the petitioner. Said petition merely recites that conviction was had upon a federal "felony" (later established not to be a felony under New York law) and thereupon requests the Appellate Division "for such ac-

tion in respect of Louis Fried as is contemplated by law", namely, to grant an automatic disbarment order (Exhibit "B" aforesaid) which the Appellate Division did, *without charges having been served and a hearing thereon,* erroneously as for a "felony".

But the main burden of respondent's opposition brief seems to be its quotation on page 2, paragraph 4 thereof, which is taken from the hearing report of Referee Arkwright upon petitioner's own reinstatement application heard in 1961 (and not upon the disbarment order of January, 1936). This quotation shows that the reason for denial of the application heard in 1961 relates to one Weinberger and Judge Galston. But on this matter, similar to its misrepresentation of fact that "charges were served on petitioner", the respondent again attempts to mislead the Supreme Court of the United States, by taking said Weinberger and Judge Galston matter out of context, without revealing the important companion fact of record, that Weinberger and Judge Galston both *supported* petitioner's said reinstatement application of 1961, as their following respective written statements, which were accepted in evidence by Referee Arkwright, show:
(from Mr. Weinberger's sworn affidavit of Dec. 12, 1949, accepted in evidence by Referee Arkwright as sub-exhibit 9 of Exhibit 3)—

> "* * * Yet, not only do I not oppose his application but I strongly urge its approval, because, as I shall point out, the facts indicate his unqualified worthiness, and his timely repudiation of his said statements against me should reflect to his commendation and credit. In coming forward before I was harmed through such statements and acknowledging the duress and coercion under which they were made, rather than follow the easier course of standing by the coerced statements, thereby to assist his eventual reinstatement appli-

cation, Mr. Fried did the nobler thing and proved exemplary courage in electing the more difficult but manly task of not allowing one to remain unjustly accused, for which our legal profession should be justly proud, and for which, surely, Mr. Fried should not be punished."

(from Judge Galston's letter dated March 5, 1948, accepted in evidence by Referee Arkwright as sub-exhibit 11 of Exhibit 3)—

"* * * Thereafter and on July 30, 1936, a motion for modification of the sentence by reducing it to 47 days was granted by me. * * * 13 years have now elapsed since the trial. If the New York Bar Association is convinced on the basis of the evidence submitted or their own investigation that Mr. Fried has effected his rehabilitation, and that his moral character, honesty and ability during this period are definitely established, I would not oppose his reinstatement . . ."

And in Judge Galston's letter there is not the slightest suggestion that at any time during the 13 years since his reduction of the sentence, was he informed that he was "deceived and tricked" by petitioner. If so, he certainly would have said so in this letter.

Further still, respondent's present Counsel also fails to apprise this Court that its previous Counsel, for about 2 years before the hearing, fully investigated and conducted the case in behalf of respondent before Referee Arkwright, and had resolved *in petitioner's* favor the identical Weinberger and Judge Galston incident, by stating to Referee Arkwright, at conclusion of the hearing, as follows:

"* * * Whether or not a man is unfit because of any single fall from grace, to be restored to the privilege of practicing law, has been greatly discussed and written about. The redeeming feature about petitioner's

refusal to commit perjury against Weinberger is that he did not know at the time that his reduction in sentence would not be disturbed (by Judge Galston). His refusal to commit perjury, in his mind at least, meant that he had to go back to jail. * * * Here, however, when we see the circumstances of a man who knew he was innocent, branded as a convict for something he never did and fearful that his wife would do away with herself and children, such circumstances are of so unusual a nature as to prompt even an upright person to fall from grace. The true mark of fitness, however, was established when that person chose not to testify falsely, as petitioner did in this case. * * * It is respectfully submitted that petitioner has demonstrated a degree of fitness which strongly recommends itself to a favorable finding for his reinstatement to the bar."

Is it not amazing then, that without giving the slightest explanation or comment as to why, in its opposition brief, the respondent now completely reverses the above conclusions of its own previous Counsel, Edward H. Levine, Esquire who, from 1959 to 1961 actually investigated, prepared and conducted the case in respondent's behalf before Referee Arkwright? Certainly this Court is entitled to know such reason, if any. Since it gives no reason, one wonders whether it intends thereby to impugn and impeach the honesty, integrity and ability of its own said Counsel who, up to the time of his death several months ago, enjoyed the finest and most enviable reputation in the legal profession for over three decades.

It should also be noted that respondent's opposition brief labors upon so-called "merits" as basis for denial of the application, rather than the controlling applicable law of the case, i.e., the *Matter of Donegan*, 282 N. Y. 285, followed again in *Matter of Koven*, 282 N. Y. 646, and *Matter*

of Ackerson, 289 N. Y. 844. In the *Donegan* case, *Ibid.*, the New York Court of Appeals stated:

> "* * * We are not concerned with the merits. The question presented is solely whether the term 'felony' as employed in the above sections of the Judiciary Law, providing for summary, permanent disbarment, includes an offense defined as a felony by Federal statute, which, if cognizable under the laws of New York, would at most be a misdemeanor . . ."

And, as the Supreme Court of the United States stated in *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96:

> "* * * the requirements of procedural due process must be met before a state can exclude a person from practicing law. * * * We are not concerned with the grounds which justify denial of a license to practice law, but only with what procedural due process requires if a license is to be withheld."

And, as the New York Court of Appeals stated in *Matter of Eldridge,* 82 N. Y. 161:

> "* * * To say that when he denies the charges brought against him he may be tried without the rights and safeguards which belong to the humblest criminal, would be to adopt a dangerous rule, and one without reason and justification. The question is important and it is best that we decide it. * * * And on that trial the accused is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to members of the bar the common rights and ordinary privileges of a citizen."

And, as Chief Justice Cardozo of the New York Court of Appeals stated in *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 468:

> "* * * True, indeed, it is that disbarment may not be ordered without specific charges."

The opposition brief advances three POINTS which, petitioner respectfully submits, are without pertinence and unsupported by legal authority.

For example, under "POINT I", it is alleged that petitioner *"defaulted or otherwise failed to answer the charges".* Nothing could be further from the truth, since, as established herein, *charges were never served upon petitioner.*

Under "POINT II" it is alleged:

> "The power of the Appellate Division to discipline an attorney is not limited to cases where his act was technically criminal and he may be punished for unprofessional conduct showing lack of due appreciation of the rules of ethics by which conduct should be regulated."

However, respondent completely ignores the all important fact that as to such unprofessional conduct, *before* disciplinary action may be taken, it is absolutely necessary that charges be served (Judiciary Law Sec. 90(6), formerly Sec. 88(2)) with hearing and rights of confrontation and cross-examination of accusing witnesses, neither of which were ever accorded in regard to said disbarment order of January, 1936,—*which is the controlling issue of this appeal.*

Then, under "POINT III" it is alleged:

> "Mr. Fried submitted himself to the jurisdiction of the Appellate Division when he applied for relief and then attended a full hearing of his application. Mr. Fried had his day in Court."

Without intending to be facetious, and with apologies for using the common vernacular, the answer to this allegation is—so what? Of course, as to said application, how else, except by submitting to the court's jurisdiction could such application be made? But the fact remains that such application heard in 1961 did not and could not validate the null and void order of January, 1936, or constitute any waiver of the jurisdictional and Constitutional defects thereof. *Corpus Juris Secundum,* Vol. 49, Sec. 451, page 882, states:

> "* * * It has been held that the validity of a judgment is to be determined as of the date of its rendition, and, if void then, it remains so forever; it is not validated and made operative * * * by subsequent proceedings based on the judgment, by afterward supplying the elements which were lacking to its validity."

In *People* v. *Hart,* 133 N.Y.S. 2d 98, the Court stated:

> "* * * A court's judgment is void if it is in excess of the power granted to it by a particular statute, although it has jurisdiction over the parties in the matter before it and has the power to act in such matter. * * * the defendant having no power to waive the question of jurisdiction, the motion must be granted."

Finally, as to respondent's aforesaid assertion under "POINT III", namely, "*and then attended a full hearing of his application*". Here again, respondent attempts to create the false impression that at said 1961 hearing, respondent had produced accusing witnesses for confrontation and cross-examination by petitioner. In truth and fact, however, not only did respondent fail to produce a single such witness, but also, did not produce a single other witness to refute or oppose any of petitioner's allegations in said application. The witnesses who appeared at said 1961 hearing were all petitioner's own witnesses. Thus the reinstatement application remained entirely unchallenged and unopposed by the respondent, and terminated with re-

spondent's own strong urging upon Referee Arkwright to grant reinstatement. Nevertheless, Referee Arkwright ignored such urging, most probably for the reason already indicated by petitioner at bottom of page 20 and top of page 21 of the "Memorandum in Support of Motion dated March 29, 1965", now part of the certified transcript herein. And as to the witnesses who supported said application, the respondent's own Counsel then stated to the Referee:

> "* * * the excellent character testimony adduced on his behalf by the men who worked with him or knew him socially, all individuals of the highest quality—serve as a glowing tribute to the high type of character the petitioner possesses. * * * Some of the character witnesses who worked with him for many years bespoke Fried's goodness with emotion which cannot be gleaned from the printed word." etc.

Among these witnesses, eight were members of the bar, one a high government official of the Veterans Administration, one a former editor of Judge Magazine, one a president of a New York advertising agency, one a U. S. District Court Judge (Hon. Leo F. Rayfiel), and a Chief psychiatrist of the Veterans Administration.

Conclusion

Petitioner respectfully submits that, in justice and fairness of the situation as appears herein, the writ of certiorari applied for should be granted, which if granted, could in no wise prejudice the respondent's opportunity at a hearing before the entire body of the Supreme Court of the United States to gainsay or refute any of petitioner's assertions herein.

Dated, March 1, 1966.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 986

LOUIS FRIED,

Petitioner,

vs.

BROOKLYN BAR ASSOCIATION,

Respondent.

PETITION FOR REHEARING UNDER RULE 58(2)

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IN THE

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OCTOBER TERM, 1965

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LOUIS FRIED,

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vs.

BROOKLYN BAR ASSOCIATION,

Respondent.

PETITION FOR REHEARING UNDER RULE 58(2)

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This petition for a rehearing of the Petition for a Writ of Certiorari which was denied by this Court March 21, 1966, is made pursuant to Rule 58(2) of the Rules of this Court.

It is respectfully submitted that the herein not previously cited authorities are of such substantial and controlling effect as to warrant the rehearing, especially when considered in the light of the following summary of law and facts of the case:

1) Petitioner's conviction in the United States District Court was a non-felony under New York law. The January, 1936 automatic Order for his disbarment upon said conviction, was admittedly issued in error as for a "felony" pursuant to New York law; and there was no compliance with the New York statute that *before* disbarment is

effected as to a non-felony conviction, charges and a hearing thereon must first be had. (See lines 28-35, p. 4 of Petition for Writ of Certiorari herein dated January 28, 1966.) The January, 1936 Order was issued without the requisite charges and hearing thereon, without confrontation and cross-examination of accusing witnesses, and without a single word of testimony taken in the *State Court before it issued said Order.* Furthermore, it was issued solely on an "information and belief" petition by the Respondent herein, to which it merely attached a certified copy of the judgment of petitioner's conviction in the *United States District Court.* (See certified transcript of "Record on Appeal" herein, Exhibit "A", pp. 10, 11, 12.)

2) The Respondent herein also has conceded, and the controlling decisions of the New York Court of Appeals have clearly established, that petitioner's conviction in the United States District Court was *not* a felony within the meaning of New York Judiciary Law, Section 88(3), under which the January, 1936 disbarment Order was issued. (*Matter of Donegan,* 282 N. Y. 285; *Matter of Ackerson,* 289 N. Y. 844; *Garsson* v. *Wallin,* aff'd 304 N. Y. 702.)

Accordingly, the January, 1936 automatic disbarment Order as for a "felony" conviction, was *jurisdictionally* null and void from its inception, and remained so forever afterward (*Corpus Juris Secundum,* Vol. 49, Sec. 451 p. 882; *People* v. *Hart,* 133 N.Y.S. 2d 98); it is unnecessary to appeal a jurisdictionally void Order (*Hughes* v. *Cuming,* 165 N. Y. 91; *Kamp* v. *Kamp,* 59 N. Y. 212); it can be assailed as invalid whenever offered, and its later affirmance on review in an Appellate Court, adds nothing to its validity (*Freeman on Judgments, 5th Ed.,* pp. 643-645); being jurisdictionally void, there is no time limit for vacating it (*Wheelock* v. *Wheelock* (N. Y.), 2 A. D. 2d 25; *Brown* v. *Brown* (N. Y.), 275 A. D. 1068); being void, the Order may be totally disregarded (*Carmody-Wait Cyclopedia of New York Practice,* Vol. 1, Sec. 137, pp.

724-725); any and all *subsequent* proceedings in the case, i.e., petitioner's independent applications for reinstatement of 1950 and thereafter, *even though under the same State court's jurisdiction,* could not validate the void Order (*People* v. *Hart, supra*); said reinstatement applications did not constitute a waiver of the jurisdictionally void Order. (*Sampson* v. *Cole* (N. Y.), 265 A. D. 259; *Blandin* v. *Ostrander* (N. Y.), 239 Fed. 700.)

Now, the additional authorities above referred to, are as follows:

1) In *Matter of Abraham A. Joseph* (N. Y.), 125 A. D. 544, the syllabus states:

> "On an application to disbar an attorney, he is entitled as a matter of right *to an independent investigation by the State courts,* and he can only be disbarred upon evidence good at common law, delivered if he chooses, *in his presence and by witnesses subject to cross-examination—the court cannot act upon testimony taken in the United States courts in a similar proceeding.*" (Italics supplied by petitioner.)
>
> NOTE: Aforesaid Exhibit "A", pp. 10, 11, 12 of the certified transcript herein, clearly shows that petitioner's disbarment Order was issued by the *State court* solely upon the aforesaid judgment of conviction in the *United States court,* and not upon a single word of testimony, confrontation and cross-examination of accusing witnesses in the State court before it issued said disbarment Order of January, 1936.

2) The syllabus in *Greene* v. *McElroy,* 360 U. S. 474, states:

> "(d) In this area of questionable constitutionality, this Court will not hold that a person may be deprived of the right to follow his chosen profession *without full hearings where accusers may be confronted and cross-examined.*" (Italics supplied by petitioner.)